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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 643.

FRANCISCO GONZALES Y BORREGO ET AL.,
APPELLANTS,

vs.

WILLIAM P. CUNNINGHAM, SHERIFF OF SANTA FÉ COUNTY, &C.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO, RESPONDENT.

BRIEF FOR APPELLANTS IN OPPOSITION TO THE MOTION TO DISMISS THE APPEAL OR AFFIRM THE JUDGMENT.

THOMAS B. CATRON,
S. F. PHILLIPS,
FREDERIC D. MCKENNEY,
For Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

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vs.

WILLIAM P. CUNNINGHAM, SHERIFF OF SANTA FÉ COUNTY, &C.

BRIEF FOR APPELLANTS IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

Statement.

This case is here on an appeal granted by an associate justice of this Court to review a judgment of the supreme court of the Territory of New Mexico discharging a writ of *habeas corpus* and remanding the appellants, four in number, to the custody of the appellee, the sheriff of Santa Fé county, to be dealt with in accordance with a prior judgment of the said supreme court sentencing the said appel-

lants and each of them to be "hanged by the neck until they and each of them be dead."

The record discloses that the four appellants were indicted at the June, A. D. 1894, term of the district court for the county of Santa Fé, New Mexico, being within the FIRST judicial district of said Territory, for the murder of one Francisco Chaves (pp. 5, 6).

On the 4th day of March, A. D. 1895, the Honorable N. B. Laughlin, associate justice of the supreme court of the Territory of New Mexico, assigned to the FIRST judicial district of said Territory, convened "a special term of the district court for the county of Santa Fé in and for the first judicial district in and for the Territory of New Mexico," to be begun on the 18th day of March, 1895, "for the term of four consecutive weeks and for such further time as in the discretion of the judge of said court may be deemed proper and necessary for the disposition of any business now pending in said court or that may come before it" (p. 6).

The case of the Territory against the appellants herein having been called for trial on the 23d of April, 1895, "the judge of the court, Honorable N. B. Laughlin, considering himself disqualified from presiding at the trial of this cause, owing to the fact of his having been connected with the prosecution herein previous to his appointment as judge, resigns the bench to the Honorable H. B. Hamilton, associate justice of the supreme court of the Territory of New Mexico and judge of the FIFTH judicial district court thereof," counsel for the respective parties agreeing "that no objections shall be hereafter raised in case the Honorable N. B. Laughlin remains within this judicial district during the trial of this cause" (pp. 8, 9), but it is to be noted that there was no consent by counsel for the accused that the judge of the FIFTH judicial district should sit in this cause in the FIRST judicial district, as is alleged in the brief for respondent.

After hearing evidence and the arguments by counsel

the jury, on May 29, 1895, returned this verdict: "We, the jury, find the defendants guilty as charged in the indictment"; (p. 18) and thereafter, motions in arrest of judgment and for a new trial having been submitted and denied, and the defendants having been called upon to say why the sentence of the court should not be passed upon them, and standing mute, they and each of them were remanded to the custody of the sheriff of the county of Santa Fé, to be by him held in confinement until a day fixed and then to be "hanged by the neck until they be dead" (p. 19).

To review this judgment and sentence the defendants sued out a writ of error from the supreme court of the Territory, and after argument the judgment of the district court was, on September 1, A. D. 1896, affirmed, and, the day fixed by the district court for their execution having passed, the supreme court further committed them to the custody of the sheriff, to be held until September 24, 1896, when they and each of them should be hanged (pp. 25, 26).

Thereafter, on the 4th day of September, A. D. 1896, on motion of the Territory of New Mexico, by her solicitor general, the judgment aforesaid was vacated and set aside, and the said Territory, being the defendant in error and the *prevailing* party, was granted a rehearing of said cause; and the said defendant in error having also suggested diminution of the record and prayed for a certiorari, the said prayer was granted and a writ of certiorari was issued (pp. 27, 28).

On the 9th day of September, A. D. 1896, the Honorable N. B. Laughlin, judge of the FIRST judicial district of the Territory, as above stated, convened a further special term of said district court in and for the county of Santa Fé, to be begun on the 21st day of September, A. D. 1896, for the

purpose of hearing and determining all causes that may be pending in said court, &c. (p. 20).

Thereafter, on September 22, 1896, of the said special term, the Honorable H. B. Hamilton, judge of the FIFTH judicial district court presiding, and upon motion in behalf of the Territory of New Mexico "to make a proper and sufficient entry in the records of the proceedings of this court had on the 23d day of April, A. D. 1895, of the arraignment in said court at said time of the said defendants * * * upon the indictment in said cause and of their respective pleas of not guilty thereto," and it appearing to the court that the record "is not a full and correct record of the proceedings had in said court upon said day in said cause," in this, that said record fails to show the arraignment of the said defendants respectively upon the indictment in said cause and the respective pleas of not guilty then entered by said defendants respectively thereto, it was ordered "that the said proceedings be entered now upon the records of this court in this cause, as of the 23d day of April, 1895, according to the facts thereof" (pp. 21 and 22).

This *nunc pro tunc* order, together with the order convening the special term at which it was entered, having been returned to the supreme court of the Territory on the 24th day of September, A. D. 1896, and that court having overruled the motion of defendants' counsel to strike the same from the files (p. 30) upon the same day the cause having come on to be heard upon the rehearing theretofore granted "and upon the amended record," and the court, being sufficiently advised in the premises, again affirmed the judgment and sentence of the district court and fixed October 16, 1896, as the day of execution (p. 31).

Thereafter, on the same 24th of September, A. D. 1896, the said defendants, by leave of court, filed a petition in the supreme court of the Territory of New Mexico for a writ of

habeas corpus, alleging, among other things, that they and each of them was unlawfully restrained of his liberty pursuant to the judgment of the district court of the first judicial district of New Mexico, sitting within the county of Santa Fé, affirmed as above set out, to render which judgment the said district court was without jurisdiction, the said verdict and the judgment thereon being *coram non judice* because—

1st. The special term of the district court at which they were rendered overran and conflicted with the regular terms of said court, contrary to law and the statutes in such case provided; and—

2d. Because it did not properly, if at all, appear that defendants had been arraigned and afforded an opportunity to plead; and—

3d. Because the judge of the FIFTH judicial district court had no power or authority to preside over the FIRST judicial district court, and his acts while so presiding were absolutely null and void (pp. 3–5).

Upon this petition a writ of *habeas corpus* was issued (p. 63), but upon consideration of the sheriff's return to said writ and the petitioners' answer thereto it was on the 25th day of September, A. D. 1896, ordered that said writ be discharged and the petitioners remanded to custody, to be dealt with according to the judgment and sentence of the supreme court of New Mexico (p. 63).

From the order discharging the writ and remanding to custody petitioners prayed an appeal to this Court, which was denied (p. 64), for reasons stated in an opinion by the Court (p. 65).

Thereupon petitioners moved the honorable justice of the Supreme Court of the United States assigned to the eighth circuit for the allowance of an appeal to review the judgment aforesaid discharging the writ of *habeas corpus*, and such appeal was allowed.

JURISDICTION.

This Court is amply endowed with jurisdiction to hear and determine an appeal from a decision of the supreme court of the Territory of New Mexico upon a writ of HABEAS CORPUS involving the question of personal freedom, wherein is drawn in question the validity of an authority exercised under the United States.

By the organic act establishing a territorial government for New Mexico (9 Stats. at L., 446) and by the tenth section thereof (p. 449) it was enacted—

"That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. * * * The said Territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court, at such time and place as may be prescribed by law; and the said judges shall, after their appointments, respectively reside in the districts which shall be assigned them. * * * A writ of error or appeal shall also be allowed to the Supreme Court of the United States from the decision of the said supreme court created by this act, or of any judge thereof, or of the district courts created by this act, or of any judge thereof, upon any writ of *habeas corpus* involving the question of personal freedom." * * *

These provisions were substantially re-enacted by the act of June 23, 1874 (18 Stats. at L., 253) which now appears as sections 1907 and 1909 of the Revised Statutes of the United States, the latter section being as follows:

"Writs of error and appeals from the final decisions of the supreme court of * * * New Mexico * * * shall be allowed to the Supreme Court of the United States in the same manner and under the same regulations as

from the circuit courts of the United States * * * except that a writ of error or appeal shall be allowed to the Supreme Court of the United States from the decision of the supreme courts (of the Territories mentioned) or of any judge thereof, or of the district courts (of said Territories), or of any judge thereof, upon writs of *habeas corpus* involving the question of personal freedom."

It thus appears that the Congress has been ever solicitous concerning the right of appeal to this Court from decisions of the territorial courts upon writs of *habeas corpus* involving personal freedom.

By the act of March 3, 1885 (23 Stats. at L., 443), however, it was enacted—

"That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia or in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars."

"That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

Whether this statute was intended to or does prohibit appeals to review a decision of the supreme court of a Territory in cases of *habeas corpus* involving personal freedom "in which is drawn in question the validity of * * * an authority exercised under the United States" is the precise question presented by the motion to dismiss herein.

That the petition praying the issuance of the *habeas corpus* distinctly draws in question the validity of an authority exercised under the United States cannot be doubted.

Territorial judges are endowed with judicial authority by virtue of the laws of the United States and not otherwise.

By the Revised States of the United States, section 1874, it is provided that—

"The judges of the supreme court of each Territory are authorized to hold court WITHIN their respective districts, in the counties wherein, by the laws of the Territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes, except those in which the United States is a party; but the expense of holding such courts shall be paid by the Territory or by the counties in which the courts are held, and the United States shall in no case be chargeable therewith."

The power thus expressly conferred to hold court "within" their respective districts must, upon well-known principles, be taken as exclusive of any power to hold court "outside" of their respective districts.

The power being so conferred and restricted by Congress is beyond the reach of the territorial legislature.

Hence it matters not that the territorial legislature has enacted (Compiled Laws of New Mexico, 1884, sec. 526), that—

"When any judge of any district court shall be absent from his district, or shall be in any manner incapacitated from performing any of his duties as such judge, any other district judge in the Territory may perform any and all such duties for him the same as he might do if present or able to act: *Provided*, That nothing herein contained shall be held to require that such other district judge must come within the district of the judge for whom he is acting before he can properly perform such duties as aforesaid,"

the associate judges of the supreme court of the Territory being the "judges of the district courts" referred to.

The want of power and judicial authority in associate judges of the supreme courts of Territories to hold court "outside" of their respective districts has been at least persuasively declared.

Stanley *vs.* United States, 1 Okla., 340.

Peters *vs.* United States, 2 Okla., 191.

As territorial judges hold court solely by virtue of the authority of the United States when the *existence* of that authority in any particular instance is denied, and such denial as here forms the subject of direct inquiry, the *validity* of the authority is drawn in question.

United States *vs.* Lynch, 137 U. S., 280, 285.

In such a case this Court is clothed with jurisdiction to hear and determine the matter upon appeal.

In thus contending we are not unmindful of the fact that various decisions of this Court construing the act of March 3, 1885, *supra*, if not carefully scanned, would seem to lead to an opposite conclusion, but it is to be observed that such cases were either of a *criminal character*—

Farnsworth *vs.* Montana, 129 U. S., 104;
United States *vs.* Sauges, 144 U. S., 310;

or involved questions arising in the courts of the District of Columbia where the matter of the right of appeal to this Court depended upon the consideration of local statutes.

United States *vs.* More, 3 Cranch, 159, 173.
In re Heath, 144 U. S., 92.
Cross *vs.* Burke, 146 U. S., 82, 87, 88.
Chapman *vs.* United States (November 30, 1896).
Perrine *vs.* Slack, *ibid.*

That the act of March 3, 1885, above quoted, was not intended to prohibit appeals from the supreme courts of the Territories in cases of a *civil* character "in which is drawn in question the validity of * * * an authority exercised under the United States," notwithstanding the matter in dispute was "of such a nature as to be incapable of being reduced to any pecuniary standard of value," has been at least twice decided by this Court after oral argument in cases where the jurisdiction to entertain the appeal was distinctly challenged.

In Clayton *vs.* Utah Territory, 132 U. S., 632, the opinion of the Court being by Mr. Justice Miller (January 6, 1890), there was drawn in question the authority of the governor of Utah to appoint one Pratt to be auditor of public accounts of said Territory, he claiming the right to exercise such authority upon the hypothesis that there was a vacancy in that office which he had a right to fill.

The action was begun in one of the district courts of Utah Territory by a complaint in the name of the People of the Territory against Clayton, the then incumbent of the office of auditor of public accounts, alleging that he had usurped and intruded himself into said office and was exercising its functions without authority of law, and, further, that the governor of the Territory had duly appointed Pratt to be auditor of public accounts, and the latter, having duly qualified as provided by law, had demanded of the said Clayton "that he should surrender to him the said office and the insignia thereof; which demand was then and there refused by the defendant."

Clayton sought to maintain his right to the office upon the provisions of the territorial act of January 20, 1852, creating the offices of treasurer and auditor of public accounts and defining the duties of each, and providing that the officers to fill the same "should be elected by the joint vote of both houses of the Legislative Assembly, and that their term of office should be four years and *until their successors were elected and qualified, unless sooner superseded by legislative election,*" declaring that he had been duly elected auditor of public accounts at the regular election held August 2, 1880, and "that since said election of 1880 no one had been elected to fill the office, nor had he (Clayton) resigned." * * *

The governor based his claim of *right to appoint* upon the seventh section of the organic act of September 9, 1850 (9 Stats., 453, c. 51), which section was reproduced almost verbatim in section 1857 of the Revised Statutes of the United States.

The district court decided that the territorial act referred

to was void because in conflict with the provisions of the organic act—the "constitution" of the Territory—and directed Clayton to surrender the office and Pratt to be installed therein. Upon appeal to the supreme court of the Territory this judgment was affirmed and an appeal was taken to this Court.

Motion to dismiss the appeal was made, which motion was postponed and argued orally with the merits.

This Court said:

"The first question presented to us for decision concerns "the jurisdiction of this Court to entertain the appeal from "the supreme court of the Territory. The law which gov- "erns that jurisdiction now is the act of Congress of March 3, "1885, 23 Stats., 443. * * * We have no difficulty in "holding that the record before us presents a case in which "there was drawn in question an authority exercised under "the United States within the meaning of the second sec- "tion. This authority was that exercised by the governor "in the appointment of Arthur Pratt, acting upon the hy- "pothesis that there was a vacancy in that office which he "had a right to fill." * * *

"It will be observed that this second section of the statute, while it is based upon the general principle which is found in the act of Congress allowing writs of error from this Court to the highest court of a State, namely, to protect parties against the exercise of an unlawful power on the part of the State authorities, does not use the language which is found in that act; that to give this Court jurisdiction the decision of the State court must be *against* the right or power set up by the party under the laws of the United States. On the contrary, this peculiar feature of the appellate jurisdiction of this Court over that of the State courts is left out when the matter comes to be applied to the Territories, and it is held sufficient that there should be drawn 'in question the validity of a treaty or statute of or an authority exercised under tho United States;' and it is not required that the decision of the *State* (territorial) court should be against the validity of the treaty, statute, or authority so exercised or claimed. We are therefore very clear that as the supreme court of the Territory of Utah based its decision upon the power conferred upon the governor by

the seventh section of the organic act of Utah to make appointments to office this power was drawn in question and gives the defendant Clayton a right to have the judgment of this Court upon it.

"The motion to dismiss the case for want of jurisdiction is therefore overruled."

Could the law of the case now at bar be described in more apt words? It is nowhere suggested in the Clayton case that there was any matter in dispute capable of being reduced to a pecuniary standard of value. The direct subject of inquiry, or, as it has been expressed, "the particular object of the suit," was the *power* of the governor to make appointments to office.

If it should be suggested that pecuniary emoluments were or might be assumed to be annexed to the office of auditor of public accounts, and that, therefore, there was some pecuniary sum or value in dispute, we would reply that such fact is merely incidental and can have no more bearing or effect in determining the question of jurisdiction than did the fines of money in the cases of U. S. *vs.* More, 3 Cranch, 159, and United States *vs.* Chapman, 163 U. S., —.

As "in the eye of the law" the fine was a punishment for the offense committed, so "in the eye of the law" the emoluments of the office are but of the incidental benefits of the power of appointment.

As of the *fines* in the More and Chapman cases, so it may be said of the emoluments of office in Clayton's case, if any such existed, they did not constitute "the particular object of the suit."

In Clough *vs.* Curtis and Burkhart *vs.* Reed, 134 U. S. 361, the opinion of the Court being by Mr. Justice Harlan (March 17, 1890), the jurisdiction of this Court, under section 2 of the act of March 3, 1885, to review on appeal the judgments of the supreme court of the Territory of Idaho denying certain applications for writs of *mandamus* to compel the secretary of the Territory to record certain proceedings as part of the

proceedings of the territorial legislature and to require the chief clerk of the house of representatives of the Territory to bring his journals into the court in order that they might be corrected in the presence of the court was distinctly questioned. In neither case did the petitioners claim to have any beneficial interest in the proceedings.

Upon the question of jurisdiction the opinion reads as follows (p. 369:)

* * * "The jurisdiction of this Court to review the judgment below depends upon the inquiry whether the present case is embraced by section 2 of the act of March 3, 1885, authorizing this Court, without regard to the sum or value in dispute, to review the judgment or decree of the supreme court of a Territory in any case in which is drawn in question the validity of an authority exercised under the United States. Do the cases now before us raise any question as to the validity of an authority exercised under the United States? We are of opinion that they do. * * * By the Revised Statutes of the United States the legislative power in each Territory is vested in the governor and a Legislative Assembly, the latter to consist of a council and house of representatives. * * * In each case is directly drawn in question the lawful existence of those bodies as the council and house of representatives of the Territory, and consequently the authority which they have assumed, as the Legislative Assembly of the Territory, to exercise under the United States. * * * The case now before us is within the very letter of the act of 1885, because there is drawn in question the validity of an authority exercised under the United States (citing Clayton *vs.* Utah). It is consequently our duty to inquire whether the court below erred in withholding the relief asked by the petitioners."

In United States *vs.* Lynch, 137 U. S., 280, the cases of Clayton *vs.* Utah and Clough *vs.* Curtis were cited in the opinion by Mr. Chief Justice Fuller as authority upon the jurisdictional point without question or doubt.

While the broad language of the opinions in the several cases more recently decided, and especially in cases appealed

from the supreme court of the District of Columbia, notably the Chapman case and the Perrine *vs.* Slack cases, may be thought to conflict with the construction of the second section of the act of March 3, 1885, announced in Clayton *vs.* Utah and reiterated in Clough *vs.* Curtis, it is to be noted that these cases are not referred to in either of the cases first mentioned. It is certain that they have not been expressly overruled, and repeals by implication are not favored.

Boni judicis est ampliare jurisdictionem.

Potent, indeed, must be the suggestion which will induce this Court to curtail its jurisdiction solemnly declared.

That a *habeas corpus* suit is a civil and not a criminal proceeding is well settled.

Kurtz *vs.* Moffett, 115 U. S., 487.

ON THE MERITS.

The application for a HABEAS CORPUS draws in question the validity of an authority exercised under the United States and alleges that the judgment passed upon appellants, under which they are deprived of their personal freedom, was coram non judice; therefore void.

The argument is that the "associate justice of the supreme court of the Territory of New Mexico and judge of the FIFTH judicial district court thereof" was without judicial authority to preside over the proceedings of the FIRST judicial district court, and that his acts while so presiding were void; and, further, that such acts were not the acts of a judge *de facto*, because the record discloses the existence during the entire term of the proceedings of a *de jure* judge of the first judicial district, and it is fundamental that a

de jure officer and a *de facto* officer, being different persons, cannot occupy the same office at the same time.

By section 7 of the organic act of the Territory of New Mexico (9 Stats., 466) it is provided—

"That the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act."

By section 10 of the same act it is provided—

"That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate justices. * * * The said Territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court, at such time and place as may be prescribed by law; and the said judges shall, after their appointments, respectively, reside in the districts which shall be assigned them."

The Revised Statutes of the United States relating to the Territories contain the following provisions:

"SEC. 1851. The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. * * *

"SEC. 1865. Every Territory shall be divided into three judicial districts; and a district court shall be held in each district of the Territory by one of the justices of the supreme court, at such time and place as may be prescribed by law; and each judge, after assignment, shall reside in the district to which he is assigned.

"SEC. 1874. The judges of the supreme court of each Territory are authorized to hold court within their respective districts, in the counties wherein, by the laws of the Territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes, except those in which the United States is a party.

"SEC. 1912. The supreme * * * courts of each Ter-

ritory * * * may grant writs of *habeas corpus* in all cases in which the same are grantable by the judges of the United States in the District of Columbia.

"SEC. 1914. The judges of the supreme court in each of the Territories of New Mexico and Arizona, or a majority of them, shall, when assembled at their respective seats of government, fix and appoint the several times and places of holding the courts in their respective districts, and limit the duration of the terms thereof." * * *

Notwithstanding the foregoing provisions, the territorial legislature, by section 1852 of the Compiled Laws of New Mexico of 1884, enacted in contravention of section 1851, Revised Statutes of the United States above, the following:

"When any judge of any district court shall be absent from his district, or shall be in any manner incapacitated from performing any of his duties as such judge, any other district judge in the Territory may perform any and all such duties for him the same as he might do if present and able to act." * * *

Said enactment being in terms inconsistent with section 1874 of the Revised Statutes of the United States, above quoted, expressly limiting the authority of the district judges to holding court within the limits of their respective districts.

There being a conflict between the territorial act and the organic act, the latter must prevail.

Clayton *vs.* Utah, 132 U. S., 632–638.
Ferris *vs.* Higley, 20 Wall., 375.

The organic act establishes the powers and authority of district courts and district judges, and it must be strictly construed.

Paul *vs.* Armstrong, 1 Nev., 100.
Winters *vs.* Hughes, 3 Utah, 448.
Leckren *vs.* Martin, 1 Kans., 498.
Ferris *vs.* Higley, *supra.*
Stahley *vs.* United States, 1 Okla., 336.

A judge cannot in the absence of legislative authority exercise jurisdiction outside of his own district.

Ex parte Parker, 6 S. C., 472.

Parties cannot by consent confer any such authority in civil cases (Hoagland *vs.* Creed, 81 Ills., 507), and certainly not in those of a criminal character.

Murray *vs.* State, 34 Texas, 332.

In Crane *vs.* United States, 162 U. S., 644, this Court, remarking that the public has an interest in the life and liberty of an accused person, declares that:

"Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure when on trial and in custody to object to unauthorized methods."

The judge of the *fifth* judicial district was without lawful authority to hold court in the FIRST judicial district. Being without jurisdiction, all proceedings before him, including the sentence, are void, and the petitioners should be afforded the protection of the writ of *habeas corpus*.

1 Bishop New Crim. Pro., sec. 316.

But it may be contended that the acts of the judge of the fifth district performed outside of that district and within the first district were nevertheless the acts of a judge *de facto*, and hence binding upon the appellants.

It is not denied that Judge Hamilton was an associate justice of the supreme court of the Territory, and that he was authorized to hold the district court in the district to

which he had been assigned; but he had not been assigned to the *first* district, nor does it appear that there was a vacancy in the judgeship of that district. On the contrary, the record discloses that Judge Laughlin, on the 4th of March, 1895, convened the special term at which the trial was held (p. 6), and afterwards, on April 23, 1895, considering himself disqualified from presiding at the trial, he resigned the bench "to the Honorable H. B. Hamilton, associate justice of the supreme court of the Territory of New Mexico and judge of the FIFTH judicial district court thereof" (p. 8); and in view of the stated agreement between counsel (p. 9) it is fair to assume that Judge Laughlin remained within the first district, where he was by law required to reside, during the time of the trial.

After the trial in the district court had been concluded and while the case was pending in the supreme court of the Territory on writ of error it was deemed advisable to correct the record by certain *nunc pro tunc* orders. Thereupon, on the 9th day of September, 1896, Judge Laughlin again convened a special term of his court, and on the 24th day of September, 1896 (p. 51), Judge Hamilton presiding, the order correcting the record *nunc pro tunc* was entered (p. 53).

In the course of the proceedings then it appears that the *de jure* officer was at hand and took an active part therein by way of convening special terms whenever the exigency of the case seemed to require.

As the law provides for but a single incumbent of the office of district judge of the first judicial district of New Mexico, and the *de jure* occupant of that office being present within the district throughout the trial, there was no room within that district for a judge *de facto*.

Boardman *vs.* Halliday, 10 Paige (N. Y.), 232.
Conover *vs.* Devlin, 15 How. (N. Y.), Pr., 470.
Cohn *vs.* Beal, 61 Miss., 398.

"To constitute a person an officer *de facto* he must be in the actual possession of the office and in the exercise of its functions and in the discharge of its duties. When this is the fact, necessarily *there can be no other incumbent of the office.* An officer *de jure* is one who has the lawful right to the office, but who has either been ousted from or never actually taken possession of the office. When the officer *de jure* is also the officer *de facto,* the lawful title and possession are united; then no other person can be an officer *de facto* for that office."

Hamlin *vs.* Kassafer, 15 Oregon, 456.

"Two persons cannot be officers *de facto* for the same office at the same time."

McCahon *vs.* Com'rs Leavenworth Co., 8 Kan., 442.

Judge Laughlin was both *de jure* and *de facto* district judge of the first district. In him were united the lawful title and the possession. While he so remained neither Judge Hamilton nor any other person could be or become *de facto* judge for that district. It would be a strange doctrine to announce that whenever an officer steps out of the place where he usually performs the duties of his office that any other person may at once step in, by invitation or otherwise, and immediately become an officer *de facto.*

2.

It further appears from the record that the special term at which the trial was held overran and conflicted with three different regular terms fixed by law to be held within the same district.

In the first place, it is suggested that as the Congress had provided that the territorial legislature should fix the time and place of holding court the legislature could not delegate the authority or power so to do to the judges.

Winters *vs.* Hughes, 3 Utah, 444.

But in any event, even if authority to convene special terms be conceded to the judges, it is clear that such special terms cannot lawfully overrun and conflict with the regular terms prescribed by law.

Section 553, Compiled Laws N. M., 1884, provides that—

"Any special term of the district court that may be ordered under this act shall be held for the purpose of hearing and determining all causes that may be depending in said court, both civil and criminal, *and may continue in session the same length of time that is allotted to the regular term of court for such county and no longer.*"

It is also provided by section 1 of an act of the legislature approved February 22, 1893, as follows:

"The terms of the district courts hereafter to be held in the counties of Santa Fé, San Juan, Rio Arriba, and Taos shall be held in said counties beginning at the times hereinafter fixed and continuing until adjourned by order of the court, to wit:

"In the county of San Juan, on the third Mondays in April and October.

"In the county of Rio Arriba, on the first Mondays in May and November.

"In the county of Taos, on the third Mondays in May and November.

"In the county of Santa Fé, on the second Mondays in June and December."

All these counties constitute the first judicial district.

The special term at which petitioners were tried was continued from March 18, 1895, to June 15, 1895, and interfered with each one of the regular terms of court fixed for each of the said four counties. It is submitted that by holding said court over and into the times of the regular terms, the special

term, if it had any validity at any time, had expired long before the termination of the trial of the defendants.

In re Millington, 24 Kas., 160.
Cox *vs.* State, 30 Kas., 202.
Davis *vs.* Fish, 1 Green (Ia.), 409.
Gable *vs.* State, 2 Green (Ia.), 565.
Gregg *vs.* Cook, Peck (Tenn.), 82.
Ex parte Lilley, 7 S. C., 372.
Galushe *vs.* Butterfield, 2 Scam., 227.
Goodsel *vs.* Boynton, 1 Scam., 555.
Mandum *vs.* Comm., 6 Randall, 715.
Dunn *vs.* State, 2 Ark., 249.
Kane *vs.* Goda, 84 Ind., 209.
Batton *vs.* State, 80 Ind., 396.
Numa *vs.* Hammond, 46 Ind., 119.
Archer *vs.* Ross, 2 Scam., 303.
In re Dosset, 37 Pac. Rep., 1066.

The motion to dismiss or affirm should be denied.

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Attorneys for Appellants.

DECEMBER, 1896.

164-704

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164-704

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

JAMES DYER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 429.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

CONFESSION OF ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

JAMES DYER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 429.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

CONFESSION OF ERROR.

Plaintiff in error, James Dyer, was indicted for robbery. (Rec., p. 1.) He was convicted and sentenced to the penitentiary. (Rec., pp. 10–13.)

On the trial the Government introduced L. M. Best, who testified that—

> On the night of November 13, 1894, the night of the Blackstone robbery, he saw Jim Dyer on horseback, about 11 o'clock at night, at Van's ford, which was about three and a half miles from Blackstone. Dyer whooped as he passed in the road. He saw no arms about Dyer. After that, on the same night, he saw Dyer in a camp at the edge of the prairie. When he saw Dyer in the bottom at Van's ford

> Best was on his way to tell Jones about a horse which had been stolen from Jones, and that when he saw Dyer in the camp at the prairie on his return that night Jones, Collier, and Nelson were with him, going after the horse. The horse was gotten out of Dick Reynolds's pasture. He had had a conversation with Dyer in April last, when Dyer told him that he proved when he was arrested and taken to Muscogee, shortly after the robbery, that he was in Texas the night of the robbery; that he built the house of Dyer, and was told by Dyer to make the scuttle covering fit close, as he might want to hide some of his friends in the loft, and to build it so that it would not be noticed. (Rec., pp. 14, 15.)

The defendant testified in his own behalf. Among other things he said:

> That he was not out that night about Van's ford and was not seen by L. M. Best, but a night or two after the robbery he was out near Van's ford, about 3 miles from his home. * * * He denies *in toto* ever giving any direction to L. M. Best in reference to a scuttle-hole in the ceiling of his house. He also denies that he ever told L. M. Best to cut the scuttle-hole or to make it so it would not be seen or noticed, and that he might want to hide or conceal people in there. (Rec., p. 18.)

The defendant introduced eight witnesses who testified that the reputation for truth of said Best was bad. (Rec., p. 19.)

The testimony did not show that any of these witnesses, except Brady, Park, and Price, had ever been arrested for crime. None of them had ever been convicted of anything. (Rec., p. 19.)

The judge charged as follows:

Efforts have been made here to impeach the testimony of witnesses in behalf not only of the defendant Luckey, but also in the behalf of the defendant Dyer, by proof of general bad character of the witnesses testifying against them. You are to receive the impeachment or the attempt at impeachment of that kind with caution. You are to weigh it with care. You are to look at it with discrimination. *You have a right and it is your duty in trying this case to take into consideration your common knowledge, the common knowledge, even, that you may have gathered by observation since you have been sitting in this court at this term, and you have a right to consider the frequency with which this attempt is resorted to.* You have a right to consider that as a matter coming to you as common knowledge *and which I can truthfully say is common knowledge to the court, and that there is but one of the twelve apostles, if he lived in the Indian country, that could not have been impeached, and that is Judas, and perhaps they might have attacked him; I do not know.*

It would have been easy to attack them, from *Paul to Peter, and there is not one of them who could not have been successfully impeached if you believe everything that this crowd, this horde of scandal mongers, that drive in here at the expense of the Government year after year ready to blacken the name of any created human being, from the Savior to the lowest creatures on earth, say. I say this to you because it is common knowledge; it is common observation; it has been gathered by every jury that has ever sat in this court;* and when you come to an attempt of that kind I ask you to look at it with care, look at it with caution, look at the motive that may be behind it, and bear in mind that this attempt upon character

> is one which brings in all the scandal existing in the neighborhood; it opens wide the door of hatred, of animosity, and a desire for vengeance, and every personal evil consideration that may prompt the mind of man; that is the truth about it. Therefore, you are to see to it before you pay any attention whatever to that kind of attack upon witnesses that those who come here to impeach are in the first place prompted by proper motives, and in the second place they are competent to know what general character means, and, thirdly, that their statements are the fair and honest reflection of the people generally in the neighborhood where they live. (Rec., pp. 44, 45.)

The sixth exception to the charge of the court was as follows:

> As to what the court says as to—the jury has a right to take into consideration from their common observation, gathered from their observations here in this court and elsewhere, and what the court says as to his own observations in this court and as to *ex post facto* statements gathered by witnesses on the way here and by laying around this court and otherwise, and the charge of the court generally upon the impeaching testimony. (Rec., p. 38.)

It is believed by the undersigned that the foregoing extract from the charge is indefensible, and that the judgment should be reversed, and therefore error is confessed.

HOLMES CONRAD,
Solicitor-General.

J. M. DICKINSON,
Assistant Attorney-General.